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VIRGINIA LAW REGISTER

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Delinquent Children: Defective and Ambiguous Legislation.

We had occasion some time since, in the November 1917 number of the REGISTER, to comment on the unfortunate ambiguities in the Act of March 17th, 1915, making it a misdemeanor for a husband to desert or neglect to provide for the support of his wife or children.

We find another most excellent remedial act marred in the same way, by the failure of the draughtsman to follow up in the act the provisions which are antecedent and to consider the widereaching effect of the law. In other words there are provisions in the act impossible to reconcile. Others, absolutely shocking if to be taken in literal term. This, we are of opinion, grows out of the fact that the draughtsman of this act took the New York and Ohio Statutes on this subject and in some way combined them without reference to existing Virginia law and without realizing that "Domestic Courts" do not exist in many of the cities of our State, if indeed in any. The designation of any person under eighteen years of age as a "child" and the positive prohibition of the commitment to jail, etc., of any person under eighteen, unless the offence be aggravated, or the ends of justice demand otherwise," may be all right in cities of any size, but in the counties and smaller towns the result, as far as our experience goes, the offender is released, or sent to jail without any one knowing of it until the youth is brought into court. We know of one case in which a magistrate sent a little negro of thirteen years to jail to await the action of the grand jury. He was accused of cutting with intent to maim, etc., etc. The Attorney for the Commonwealth accidentally found out the age of the "criminal." He directed the magistrate to send the child to the State Board of Charities and Corrections. An appeal was taken and the youngster lay in jail for four months. When

brought into court the little creature's appearance was ludicrous and the evidence developed a fight in which he cut a playmate with a knife. The question came up, Was he entitled to a jury trial? He had not been indicted, as a matter of course. The Judge, though in some doubt, held that he was. He was tried, found "guilty" and the Judge held that he had been sufficiently punished, and a first rate character being given him, he was handed over to his relatives. Now, he never should have been sent to jail; but what was to be done with him? An appeal lies from the order of the magistrate committing the delinquent child to the custody of the Society. "Cutting" cases are generally considered "aggravated." Ought there not to be some provision to differentiate between a child and a youth? Had this been a youth of sixteen or seventeen, a jury would have undoubtedly meted out punishment, which it would not have done to a child of tender years. But the jury cannot *punish*, as we will show later on. Therefore a youth of sixteen or seventeen would have to be sent to a reformatory or committed to the State Board. How is he to be detained in case of an appeal? He has an undoubted right under the statute to take the case to the Supreme Court, which in many instances means the delay of a year. He must not be put in jail. Suppose he cannot find bail—must he be turned loose on the community? These are some difficulties for which there does not appear any solution.

But let us now consider the whole act: It is for the safeguarding of "delinquent children." The act defines a "delinquent child" to be "A child under eighteen years of age who violates a law of this State or a *city or town ordinance*, or who is incorrigible, or who is a persistent truant," etc., etc. "who uses vile, obscene, profane or indecent language, or is guilty of dissolute or immoral conduct." If "found in" a disorderly house, house of ill fame, saloon, bar-room or a place where intoxicating liquors are sold, exchanged, or *given away*," the unfortunate youth is delinquent. If he associates with criminals or *reputed* criminals, or vicious or immoral persons, or is growing up in *idleness* or crime; if he wanders about the streets in the night time, or uses intoxicating liquor as a beverage, or opium, morphine, cocaine or similar drug without a prescription; if he frequents, patronizes, visits or is "found in" a billard or pool room, etc., he is a "delinquent child;"

and being such, he is liable for doing any of these things to be "not a criminal or treated as such." But he can be arrested and tried by the Domestic Court Police Justice, or Justices of the Peace, and may be committed to the State Board of Charities and Corrections, or to any society, association or reformatory approved by this Board and chartered under State law.

The delinquent child, however, unless the offence is aggravated or the ends of justice require it, must:

Not be put in jail or station house or work house.

Not be *sent* on to the grand jury.

Not be sentenced to the penitentiary.

But if no society or association or reformatory will accept the child, he can then be punished under the Virginia law in accordance with his offence. But if he cannot be sent on to the grand jury, how can he be punished for a felony?

Thus we find in Section 8 of the act the following language:

> Whenever a child under *eighteen years of age* shall be charged before any police justice or juvenile and domestic relations court of any city, or before a *justice of the peace*, with any *offence embraced in section one* of this act, a hearing shall be had of the evidence bearing upon the guilt and innocence of the child. If the court shall deem the evidence insufficient for a conviction or insufficient to justify the child being sent on to a grand jury or being required to give security for good behavior, it shall discharge the child. If *insufficient* to justify a conviction or to send the *child on to a grand jury* or to require the giving of security for good behavior, then the court is empowered to act under the provisions of this statute as to the disposition of said child; provided, that the child shall have the same right of appeal from any order entered by such court or police justice or justice of the peace as is provided by law or an appeal from any judgment of conviction entered by any such court. In *case* of any *such appeal* the *court* to which such appeal is taken, or in case of any such child being sent on to a grand jury, the *court* to which the *child is so sent* shall, after the trial is had *in conformity with the requirements of law*, have, if the child is held guilty of crime, the power to act under the provisions of this statute as to the disposition of the child.

One difficulty that at once suggests itself to a reader of the statute is, this: The child cannot be sent on to a grand jury, but

when he takes an appeal the trial must be had "in conformity with the requirements of law;" so if the child commits a felony is ordered to be sent to the reformatory or into custody of the State Board and takes an appeal how can he be tried in conformity with the requirements of law unless he has been indicted, and as he cannot be sent on to the grand jury how can he be indicted? Therefore he cannot be tried, and what is to be done with him in case of a felony and an appeal from a justice? Then another difficulty is, Who is to try him, a jury or the court? If he is to be tried in conformity with the requirements of law he is entitled to a jury, whether the offence be a felony or a misdemeanor; but if a felony, there is no way of getting him before a petit jury except by an indictment, and as before set out, he cannot be sent on to a grand jury. Of course it might be held that when a felony is committed the offence is aggravated and that the ends of justice require the case to be sent on to a grand jury, but with the average magistrate in the country, reading this act, it makes it very hard for him to tell what to do, and it is equally hard for this Court to determine whether the offence is aggravated or not until it hears the evidence. It seems to us some of the ambiguity of the statute certainly ought to be cleared up, and the offences the committing of which make "delinquent children" should certainly be somewhat curtailed in their extent. We commend a careful perusal of this statute to our revisors, in view of the difficulties which seem to have arisen right often in practice.

Alcohol Now an Outlaw. All Intoxicating Liquors Cease to Be Property According to the Supreme Court of the United States.

A certain individual known as T. Jefferson, some time in the early part of the last century ordered several thousand dollars worth of wine which was duly received at Monticello and distributed amongst Mr. Jefferson's neighbors, the greater part of it having been ordered by him for others than himself, although he retained in his cellar quite a large amount of excellent French wines and good old Madeira. There was also living on the banks of the Potomac at this time another

distinguished Virginian by the name of G. Washington. George had a large and flourishing distillery on his farm and we have seen and handled an autograph letter of his in which he stated that he was now making an excellent article of whiskey at Mt. Vernon which he would be glad to sell at so many shillings per gallon, or exchange in a certain ratio for wheat and corn put down on his wharf. We wonder what these two illustrious Americans would have said if it had been told them that a little over a century later the wines of the one and the whiskey of the other would have been decreed to be "no property" and that the State could at its will practically confiscate them. We have no doubt that one would have philosophically murmured, "Autre temps, autre moeurs," but I am rather inclined to think that the other would have uttered language which they say he indulged in at the Battle of Monmouth.

Now this is no joke, for the Supreme Court of the United States, in a case from Idaho, on December 10th, handed down a decision which absolutely settles it that a state has a right to prohibit any person from having intoxicating liquors in his possession, even for personal use, and that T. Jefferson's Madeira and light French wines could have been confiscated at any time the State of Virginia saw fit, and that G. Washington's whiskey, although kept for his own private use, in his cellars at Mt. Vernon, could be absolutely destroyed without any compensation. This decision grew out of a case from the State of Idaho which prohibits the possession of intoxicating liquor without a permit for medicinal purposes, for religious sacramental ceremonies, or for industrial purposes. A man named Ed Crane who, as the learned justice who delivered the opinion of the court—Justice McReynolds—remarked, "for some reason wanted to live in Idaho," was arrested for having on his person a bottle of liquor, the size of which was not stated. He was sent to jail; he sued out a writ of habeas corpus, claiming that under the 14th Amendment to the Constitution no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. The Supreme Court in rendering its decision says as follows:

> "It must now be regarded as settled that on account of their well-known noxious qualities and the extraordinary evils

shown by experience commonly to be consequent upon their use, a State has power absolutely to prohibit the manufacture, gift, purchase, sales, or transportation of intoxicating liquors within its borders without violating the guarantees of the Fourteenth Amendment.

"As the State has the power above indicated to prohibit, it may adopt such measures as are reasonably appropriate or needful to render the exercise of this power effective, and, considering this notorious difficulties always attendant upon efforts to suppress traffic of liquors, we are unable to say that this challenged inhibition of their possession was arbitrary and unreasonable or without proper relation to the legitimate legislative purpose.

"We further think it clearly follows from our numerous decisions upholds prohibition legislation that the right to hold intoxicating liquors for personal use is not one of the fundamental privileges of a citizen of the United States which no State may abridge. A contrary view would be incompatible with the undoubted power to prevent the manufacture, gift, sale, purchase, or transportation of such articles—the only feasible ways of getting them. An assured right of possession would necessarily imply some adequate method to obtain not subject to destruction at the will of the State."

In reading this opinion we are somewhat struck with the addition which the court makes to the rule as to judicial notice. For it now must be held under this decision that a court of the United States will take judicial notice that beverages containing alcohol are noxious and that their use produces extraordinary evils. We had been of the opinion that the courts only took judicial notice of things which the law made it their special duty to know or things recognized of such universal notoriety within the limits of its jurisdiction as to leave no room for any dispute about them. It therefore must be taken for a settled law that any beverage containing alcohol is so noxious and the danger arising from its use so great that the courts will take judicial notice thereof.

Had we been representing Crane in the Supreme Court of the United States we would have hied ourselves back to the great principles laid down in the immortal work of the aforementioned T Jefferson. He held that men had certain "unalienable rights, such as life, liberty and the pursuit of happiness," and we would have quoted another distinguished citizen of Albemarle as au-

thority that happiness could not be pursued without a due allowance of ardent spirits. This citizen whose name was Bezaleel G————, but ordinarily known among his acquaintances as "Bazeel"—was once being interviewed at a country dinner party as to his views concerning the kingdom of Heaven. He remarked that it was a place "whar you rid around in kerridges, enjyed yourself and were perfectly happy." "Do you suppose they have anything to drink up there?" one of the guests inquired. "In co'se, you blasted idiot," was the reply. "How can a man be happy and enjy himself without liquor?"

We believe that this asseveration of our old friend Bazeel should be placed along with the judicial notice now made part of the laws of our land by its highest tribunal.

Intoxicating Liquors—Home—What Is a Home as Used in the Prohibition Act.

Our Supreme Court of Appeals at its November Term in Richmond handed down several important opinions in which the construction of phraseology used in the Prohibition Act (Acts 1906, p. 216) was involved.

In the case of *Bare* v. *Commonwealth*, from the Circuit Court of Rockingham, Bare was convicted, fined and sent to the County jail for a month, for giving cider containing over 1% of alcohol manufactured "from fruit of his own raising" to several people—the cider having been stored in an outhouse seventy-five or eighty feet from his dwelling-house. There was no evidence of any intoxication or disorder and no effort to conceal the gift.

Our Supreme Court—Prentis, J., delivering the opinion—unanimously reversed the conviction and held that a man's home cannot be narrowed down to his mere dwelling-house; but that the words "home" and "permanent residence" as used in the act must be construed to mean the place of residence rather than any particular building which may be at that place. Except as to the places expressly excluded by several sections of the Act, the word "Home," the Court held, as used in the act includes the curtilage and entire cluster of buildings used by the family

as a habitation. If there be any doubt as to whether the building in a particular case is a part of the *bona fide* home of the accused and his family, the question should be submitted to the jury. This latter paragraph taken from the opinion of the Court, we presume was made necessary by the instruction of the lower court, which in terms instructed the jury to find the accused guilty, as the word "home" could not be extended to and did not include the outhouse mentioned in the evidence. This, as the Supreme Court said, took the question away from the jury and in effect instructed them to find the accused guilty. We are glad to note that in the clear and able opinion, the Court so defines the word "home" that juries in any future case which may arise will have little difficulty in determining what is a man's home. After quoting numerous authorities commencing with the earliest, Hale's Pleas of the Crown, 558, and bringing the cases down to the latest rendered on the subject, the Court says:

"Coming to the case and statute under consideration, it seems evident from such analogy as well as in accord with common understanding and acceptation that the words "home" and "permanent residence" must be construed to mean the place of residence rather than any particular building which may be at that place. It is the home which is loved, the spot to which when absent we expect to return, and which is idealized in our favorite song; that place or castle, which no man may enter without the consent of the owner, and in defense of which, and of every part of which, the taking of human life has been frequently excused.

The contention that the keeping and giving away of ardent spirits in this State, under this statute, must be confined to a particular building at such home, would lead to the grossest discrimination. In the case under consideration, where the evidence shows that the accused is a small farmer, that his main dwelling is small, and in which there is no suitable place in which to store any cider of his own manufacture from fruit of his own raising, because all the available space in such main dwelling is already fully occupied. The statute accords the privileges to all who occupy a *bona fide* home, while such a construction would restrict and limit it to those only who occupy large houses with wine cellars or other ample places for the storage of liquor. In many *bona fide* homes in Virginia there are no such facilities, in some instances the entire family do not sleep under the same roof,

> but either regularly or at times, because of the crowded condition of the main house, must sleep in other buildings which are within the yard or curtilage. In many other instances the kitchen, or dining room, or both, or store rooms, are detached buildings and not under the same roof with the main dwelling house. It is perfectly clear that words "at his home," as used in the statute, mean anywhere within the curtilage, as from time immemorial defined. We think that the words "in his own home" and "permanent residence of the person and his family," as used in section 61, should be construed to have substantially the same meaning as the words "at his home." This construction is greatly strengthened by section 61 itself, which apparently recognizes the inclusive meaning of the word "home" by expressly excluding certain places which would otherwise be construed to come within such definition—that is, by providing that no club, fraternity house, lodge room or rooms, or place of common resort, or room of a guest in a hotel or boarding house, shall be construed as included within the definition. But for this exclusion many of the places indicated could and should be construed as the permanent home of a person and his family. Except as to the place expressly excluded by this and the other sections of the act, the word "home," as used therein, includes the curtilage and entire cluster of buildings used by the family as a habitation."

To those who remember the old "office" which stood apart from the mansion, under the shadow of the oaks, on the lawn of the old Virginia plantation; that building where the master gave his orders each morning to the overseer, or head darkey, and where the "boys" gathered in the summer days and the mint and the loaf sugar and the ice, with its "accompaniments," were combined in the fragrant julep; to those who recall that old building, with all the memories that yet hang around it, this decision will meet with unanimous approval. The wave of fanaticism, thank God, has not yet narrowed the liberties of the *home* in the old Commonwealth, no matter what Idaho and the Supreme Court of the United States may opine concerning it. Here's to the health of the Supreme Court of Virginia and we can promise that next spring time, when the mint is green, it will be remembered—one member in particular who may recall the place—at an "office" under some venerable oak trees on an old plantation where in "lang syne" loved friends used to meet and innocent

mirth made the day speed rapidly, and where it always could have been said, as the old Roman hath it:

"Laeserunt nullos pocula nostra deos*

—*Propertius.*

Intoxicating Liquors—Indictment Time of the Offense.

The November term of our Supreme Court, as might have been expected, had several important questions for decision arising under the prohibition act. The case of Blair *v.* Commonwealth in which Blair was indicted at the January term, 1917, in Clarke County for "within one year next prior to the finding of this indictment" unlawfully selling, having in his possession two quarts of whiskey. The Court very properly held that the law not going into effect till November 1st, 1916, it was not an offense for a person to have in his possession prior to that time, at one time two quarts of whiskey and that time being the essence of the offense it was necessary to state that the unlawful possession of the whiskey was on or after November 1st, 1916. That this decision is eminently proper no one can call in question, but it is somewhat hard to reconcile it with other decisions of our Supreme Court, and with the language in Shiflett's case, 114 Va. 876, which held that it was not necessary in a prosecution for the unlawful sale of ardent spirits for the indictment to state the precise time of the sale, though that case very properly held that such fact should be stated in the indictment as would show that the offense charged was committed within the statutory period; nor with Rund's case, 108 Va. 873, when it was held that an indictment charging that the defendant did unlawfully sell and deliver intoxicating liquors without specifying the precise time when or to whom the sale was made, was sufficient both under a special act and under the general revenue acts of the State. In Robertson *v.* Commonwealth, 118 Va. 785, our Supreme Court held that a man could be convicted under a warrant for the sale of liquor on the 28th of November by

*"Our wine cups never outraged any Gods."

proof that he made a sale that day after the warrant was issued. We have always been of the opinion that the indictment for the sale of intoxicating liquor should with some particularity set out time and place, so that, as in other criminal cases, the accused should have an opportunity to defend himself against a particular charge, especially now in view of the fact that a violation of the prohibition act is punished not only by fine but the disgrace of imprisonment; and yet as the law now stands a man may be indicted for a sale of liquor within twelve months last past and not know when or how to make his defense against the charge until he is brought into court. The Commonwealth may elect one out of fifty accusations and try him when he did not know which accusation he was to meet. It is true that to convict of a violation of any prohibition act, or of any illegal sale of liquor is very often a hard and difficult thing, but we do not believe the fundamental principles of criminal law ought to be set aside in any case, no matter what the danger of failure of conviction. We have always thought that our court took the right view in Gayles' case, 115 Va. 958, when it held that the Byrd Law was a statute in a high degree penal and following Street *v.* Broaddus, 96 Va. 823, approves the language of Judge Keith: "This statute is highly penal in its nature. It is not to be extended by implication, but he who seeks to avail himself of the ruinous penalties which it imposes must bring himself strictly within its terms."

So we believe that the same strictness in the framing of the indictment and the trial of cases under the prohibition act ought to be observed, as in the indictment and trial of any other criminal case. But unquestionably the law is otherwise.